No. 4946.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

KETCHIKAN LUMBER AND SHINGLE COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. WALKER,

Defendant in Error.

ANSWER TO PETITION FOR REHEARING.

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THE RECORDER COMPANY, 693 STEVENSON ST., S. F.

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It is not the purpose of this answer to repeat the argument and authorities contained in our brief. The Court has already considered them and found them satisfactory. It is believed, however, that to point out the underlying theory of the permanent disability provisions of the Alaska Workmen's Compensation Act and to briefly refer to other points raised in the petition for rehearing will be of assistance to the Court.

I.

THE COURT CORRECTLY APPLIED THE PROVISIONS OF THE ALASKA COMPENSATION ACT RELATING TO PERMANENT DISABILITY.

Three facts appear without contradiction.

1. Defendant in error suffered the loss of a large por-

tion of his hand, but less than the loss of the entire hand.

2. The Alaska Compensation Act provides a statutory maximum payment to an employee of the class of defendant in error of three thousand one hundred and twenty ($3,120) dollars for the loss of a hand or for loss of hand and forearm.

3. The Alaska Compensation Act provides a schedule of payments for specific permanent injuries and also a blanket provision to cover injuries not specifically named.

Defendant in error in contending that the provision for specific injuries and that for miscellaneous injuries are based upon different principles and embody different schemes of recovery is missing the fundamental nature and purpose of the act.

It is clear from the nature of the statute that the Legislature intends but one scheme for permanent disability allowances, and that the blanket provision for miscellaneous injuries is to be considered in harmony with and not independently from the scheme set out by the section covering specific injuries, i. e., miscellaneous injuries are intended to be interpolated or approximated as far as possible to the injuries specifically described.

Every allowance for permanent disability has two general characteristics:

(1) It is a statutory recovery not based upon compensatory damages, but upon a limited relief in the nature of an insurance benefit to partially replace loss of wages or support.

(2) The amount of recovery for permanent disability

is based upon a statutory schedule in which injuries are classified in their order of severity and impairment of earning capacity, upon a scale graduated downward from permanent total, or 100 per cent, disability to zero.

The schedule of specific disabilities shows upon its face that the injuries therein described are classified by impairment of earning power and not upon arbitrary or purely anatomical grounds, as claimed by defendant in error.

To illustrate, the maximum recovery for total disability is $7,800. For loss of a limb, $3,900; index finger, $624; other fingers, $234; great toe, $390; other toes, $156; hand, $3,120; arm, $3,900; foot, $3,120; leg, $3,900; eye, $3,120; ear, $312; nose, $624.

Reducing these amounts to percentages of recovery allowed for total disability we find that the Legislature has classed the loss of a limb at 12% of loss of total earning capacity; index finger, 8%; other fingers, 3%; great toe, 5%; other toes, 2%; hand, 40%; arm, 50%; foot, 40%; leg, 50%; eye, 40%; ear, 4%; nose, 8%; both eyes, 100%; both hands, 100%; both arms, 100%; both feet, 100%; both legs, 100%; one hand and one foot, 100%; other total and permanent disability, 100%.

We submit the following propositions:

(a) The basis of the schedule cannot be physical impairment or anatomical loss alone, as the amount recoverable for a particular impairment varies with the marital or family condition of the worker. Also, the loss of the hand is given the same allowance as for the forearm, for a foot as for the lower leg, although the anatomical loss is greater.

(b) The basis is not compensatory damages, as no

allowance is made for varying degrees of pain, suffering, disfigurement, protraction of illness, loss of wages, etc.

(c) The classifications are wholly consistent with the theory that they are based upon earning power, as the percentages computed above for specific injuries are, in fact, proportionate to their effect upon such earning power. This is true of the loss of the nose or ear as well as of the other injuries, because the effect of such loss to the wage earner is to make him repulsive and diminish his ability to compete in an open labor market in securing employment.

(d) The grouping of many diverse injuries of different degrees of physical severity into one class of total (100%) disability shows that the *loss of earning capacity* is the test, not anatomical loss. When a worker becomes presumptively wholly unable to provide for his own support in industrial life, he becomes a total disability even though he may not have lost all his physical functions. Where he loses both feet he is better off than when he loses both hands. The loss of both hands is less severe than of both eyes. The loss of both eyes is less severe than a fracture of the spinal column, producing total paralysis of the lower half of the body. In most of these cases, the disability is not total from the physical and anatomical point of view. All three, however, presumptively terminate the employee's earning capacity and are, therefore, grouped together in one allowance.

Since the underlying basis of the schedule of specific injuries and the residuary provision covering miscellaneous injuries is fundamentally the same, it follows that the two must be considered together as creating one system. Miscellaneous injuries must be given such allow-

ance as will not do violence to the scheme outlined in the schedule. To give a man $3,120 for the loss of a hand and $5,070 for a partial loss of the same hand does violence to the legislative intent. To hold that the loss of both hands creates 100% disability, of one arm 50%, and of one hand 40%, but that the loss of a portion of one hand may be rated at 65%, is obviously to violate the legislative plan. When the Legislature classified total loss of earning capacity at 100% and loss of one hand, one foot or one eye at 40%, it could not have intended that partial loss of one hand should be rated at 65% merely because it fell under the miscellaneous provision. Again, the act does not specifically describe amputation of an arm between the elbow and shoulder. To hold that the jury could assess such loss at from 65% to 75% of total earning capacity when it could only allow 50% for amputation at the shoulder, is to make the legislative scheme an absurdity.

In the present case, as a matter of fact, defendant's earning capacity before his accident was $134 a month and at the time of trial $100 a month, a reduction of 25% instead of 75% in earning capacity.

Defendant in error's contention would produce serious disparity in recoveries between different individuals and different injuries of comparable nature, would create injustice and discrimination, and make the compensation act arbitrary and unjust.

While miscellaneous injuries cannot be interpolated by the Court into the legislative schedule with close accuracy without usurping the function of the jury, the legislative intent can at least be given effect by holding, as this Court has held, that where a given injury is com-

parable in type with those specifically described, the schedule furnishes maximum and minimum limits, only within which can the jury fix the percentage. For instance, loss of an arm midway between elbow and shoulder should not receive a lower allowance than for amputation at the elbow, nor higher than for amputation at the shoulder. And the partial loss of the hand should not be given more than for total loss of the hand.

II.

THERE IS NO EVIDENCE OF A SUBSTANTIAL KIND TO ESTABLISH ANY PERMANENT INJURY OTHER THAN PARTIAL LOSS OF THE HAND.

The decision of the Court to this effect finds ample support in the record.

Concerning defendant in error's complaints of nervousness, sleeplessness and pain, we point out that these claims rest solely upon the statement of the injured man. They are not proved, but are in fact contradicted, by the testimony of the attending physicians. They are based upon subjective and self-serving complaints only and not upon objective or demonstrable symptoms. They are unsubstantial in character.

The conditions described are also not shown to be permanent, but are instead of a nature usually of temporary duration. (Under the pleadings, defendant in error can recover only for permanent injuries.)

There is danger in accepting the unsupported statement of an injured person relative to vague and subjective complaints of this type. Exaggeration, due to

fraud or malingering, is not uncommon in personal injury suits. Neurotic conditions frequently develop in which all kinds of nervous symptoms appear, but disappear again after the case is closed. The Court, therefore, is clearly right in holding that it should take more than the evidence here presented to establish substantial proof of greater permanent disability than the loss sustained to the hand.

The fact that the employee has returned to work is also significant, as the Court points out.

III.

THE PROCEEDING SHOULD NOT BE REOPENED FOR THE PURPOSE OF MODIFYING THE JUDGMENT BELOW.

Defendant in error's claim that the judgment should be modified comes too late. It is raised for the first time in the petition for rehearing and was not urged before the Court in the briefs.

It is open to serious doubt whether this Court possesses the power, upon writ of error, to modify the judgment below by reducing the damages. The writer has discovered nothing in the Federal statutes conferring this power, and statements in current text books on Federal procedure, such as Foster's Federal Practice, sixth edition, section 711, do not show it to exist. Defendant in error presents no authorities to establish a power of modification in this manner in the Federal courts.

It is stated in 25 Corpus Juris, page 972:

"On a writ of error to a judgment in an action at law, tried by a jury, the Circuit Court of Appeals can correct

the error complained of only by directing a new trial, and cannot itself render or direct such judgment as should have been rendered below, being precluded from doing so by the Seventh Amendment to the Constitution, which requires adherence to the rule of the common law that a verdict cannot be disturbed for an error of law occurring on the trial without awarding a new trial, even where the error consists in a refusal to grant a nonsuit or to direct a verdict." (Citing several cases, including *Slocum* vs. *New York Life Insurance Company,* 228 U. S. 362.)

Plaintiff in error confessed judgment in its answer in the trial court for 75% of the loss of a hand, to-wit, $2,340, and it may be that upon a new trial with proper instructions the judgment will not substantially exceed this figure.

It is respectfully submitted that the petition for rehearing should be denied.

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